IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 271

WILLIAM ADAMS,

Petitioner,

VS.

STATE OF MARYLAND,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT

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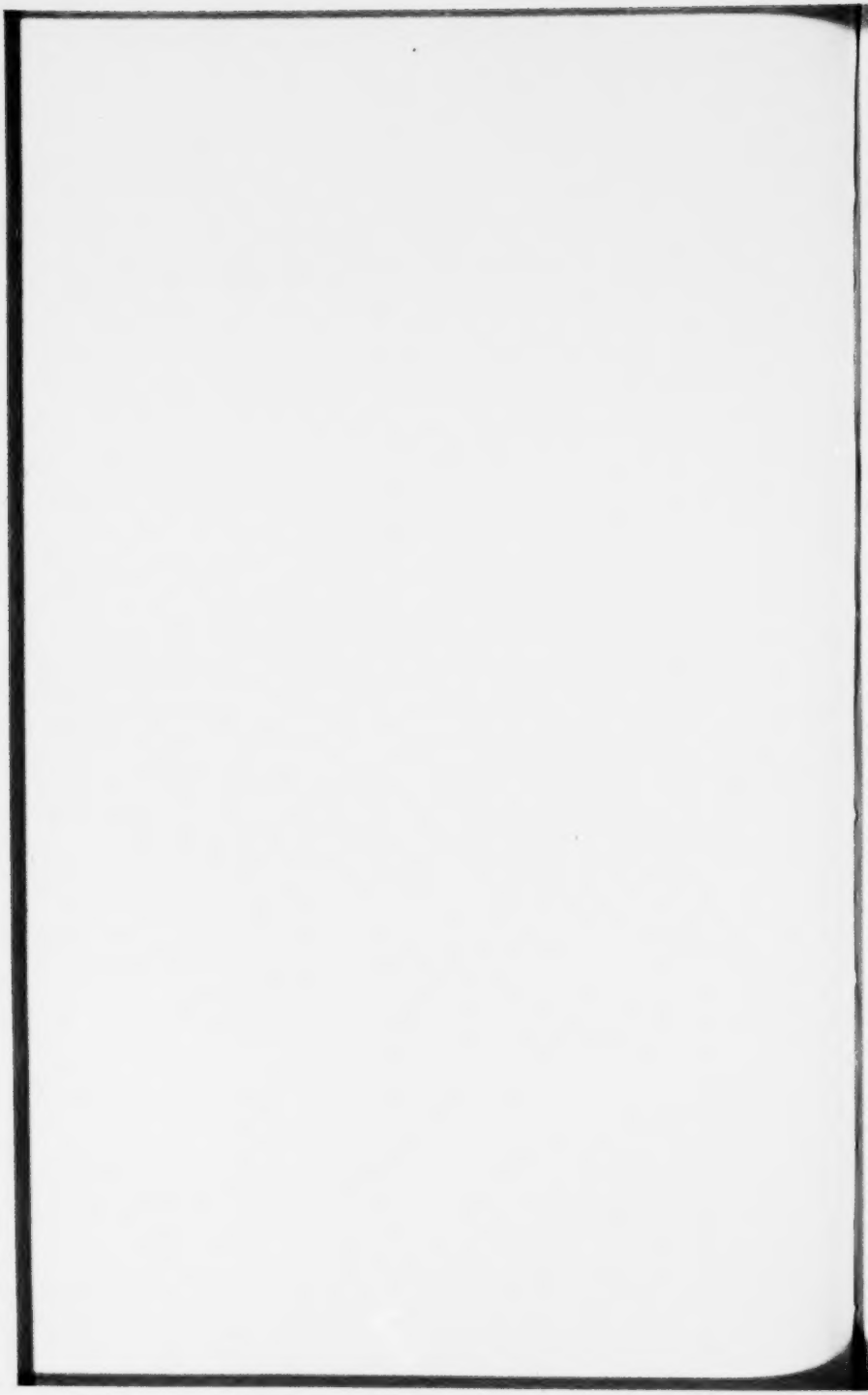

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 97 A. 2d 281 (Record p. 91).

QUESTION PRESENTED

The sole question presented here is whether certain testimony given by Petitioner before a Senate Committee was admissible at his trial on a charge of conspiracy to violate the lottery laws of the State of Maryland, or whether the same was inadmissible under the provisions

of Section 3486 of Title 18 U. S. C. A. (which statute, and other statutes of interest, may be found on page 31 of Petitioner's Appendix).

STATEMENT OF THE CASE

Respondent adopts in general the Statement of the Case made by Petitioner in his Brief, except such parts thereof as are mere conclusions of Petitioner's counsel.

In addition to the above, it is to be noted that on pages 63 and 64 of the Record, the Petitioner refused to answer certain questions because of self-incrimination, and was told by Senator Hunt that there was no way he could be compelled to answer, and that Petitioner was advised by counsel at the time of his testimony.

SUMMARY OF ARGUMENT

The question presented in this case breaks down, for purposes of argument, into three points, namely:

1. Does the Congress have power by means of the statute (Section 3486 of Title 18 U. S. C. A.) to make rules concerning the admissibility of evidence in criminal prosecutions in courts of the State of Maryland?

2. Assuming, for purposes of argument, that Congress does have such power, did it intend by the statute involved to so limit the courts of the State of Maryland, or was it intended only to apply to criminal prosecutions in the courts of the United States? and

3. Did the Petitioner waive the privilege of the statute by testifying voluntarily as to the facts which were subsequently used against him?

Respondent contends that Congress does not have power under the Constitution to make rules governing the admission of evidence in the courts of the several States, and further that even if Congress did have such power, it did not, by the statute involved herein, intend that the privilege expressed in Section 3486 of Title 18 U. S. C. A. should have application to criminal prosecutions in State courts. Further, Respondent contends that in any event, the Petitioner waived the privilege which may or may not have been afforded him by the statute by testifying voluntarily in the face of his known privilege of refusing to testify upon the grounds of self-incrimination afforded him by the Constitution.

ARGUMENT

I.

The Congress of the United States does not have the power, by statute or otherwise, to make rules governing the admission of evidence in the Courts of the State of Maryland.

It is elementary that the States have the power to establish rules of practice and procedure in State courts. It is also true that questions involving the admissibility of evidence are to be governed by the law of the forum which, in the case at bar, was that of the State of Maryland. It has been said by Professor Beale that this rule "is so obviously necessary to an efficient disposition of the business of the court that cases in which counsel have seriously contended that any other rule should be adopted are exceedingly rare." (Treatise on the Conflict of Laws, Beale, par. 597.1; Am. Jur., Vol. 20, Evidence, Secs. 5 and 8.)

It being admitted that the law of the forum must control questions of admissibility of evidence, the question re-

mains whether or not the contents of the statute (U. S. C. A. Title 18, Section 3486) is part of the law of the forum in the State of Maryland. In other words, does Congress have the right or the power to pass statutes affecting the rules of evidence which become part of the law of the forum in a State of the Union under the "Supreme Law of the Land" language of Article VI, Clause 2 of the Constitution of the United States? It has been flatly held in at least some cases in State courts of last resort that the Federal Congress does not have such authority, although, as Professor Beale points out, there has seldom been an occasion upon which such a decision has been necessary. *Noble v. Bank,* 89 N. W. 400; *Sulpho Saline Co. v. Allen,* 92 N. W. 354; *Savings Bank v. Cronin,* 114 N. W. 159.

In the above series of cases, all of which were decided by the Supreme Court of the State of Nebraska, it was held, affirmed and reaffirmed that the Federal Congress has no authority to make rules governing the admission of evidence in the courts of that State, or to determine what shall be competent or incompetent, admissible or inadmissible. In the case of *Erickson v. Hogan,* 98 N. Y. Supp. 2d 859, a nisi prius case, the court did state that Title 18, Section 3486 U. S. C. A. did apply to State courts. However, this was only dicta, as that case was determined upon the propriety of the action brought as an injunction proceeding when the question should have been raised upon a motion to quash.

Under the Tenth Amendment to the Constitution of the United States, the Federal government has only those powers which are specifically enumerated, and such others as may be implied from a fair construction of the whole instrument. *McCulloch v. Maryland,* 4 Wheat. 316, 4 L. Ed. 579. There is nothing in the Constitution which expressly,

or by implication, authorizes the Federal government either by Act of Congress or judicial decision to prescribe rules of evidence which may be binding upon the procedure of the courts of the several States. It is, of course, conceivable that a rule of evidence as applied by a State court might violate the due process clause of the Fourteenth Amendment to the Constitution, but such a problem is not here presented, and, as a matter of fact, the original statute, as pointed out in Petitioner's Brief at page 8, was passed in 1857, long before the ratification of the Fourteenth Amendment, and while, of course, it must be conceded that laws of the United States made *in pursuance of the Constitution* are the Supreme Law of the Land, nevertheless, it is Respondent's contention that an Act of Congress attempting to establish or amend rules of evidence in use in courts of the several States cannot be made in pursuance of the constitutional powers of Congress, even if Congress so intended. That this exact question has not been determined by this Court is evident from the language used in the case of *Schwartz v. Texas,* 97 L. Ed. 157 (Adv. Sh.), at page 161, in which it was said, with reference to Section 605 of the Federal Communications Act, Title 47 U. S. C. A.:

> "We hold that §605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

Respondent cites Section 8 of Article I of the Constitution giving Congress authority "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this

Constitution in the government of the United States, or in any department or officer thereof." The doctrine of inferred powers under the so-called "necessary and proper clause" must be considered in connection with the Tenth Amendment of the Constitution which, of course, provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is respectfully urged that there is nothing in the Constitution which authorizes Congress under its powers, implied or otherwise, to make rules of evidence for State courts. Justice Chase in the early case of *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, recognized that the administration of justice was one of the powers reserved to the States, when he said:

> "It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province, and duty of the state legislatures."

See also *People v. Kelley*, (Cal.) 122 Pac. 2d 655, which said, among other things:

> "* * * In matters involving solely procedure State Courts are not affected by Acts of Congress. Subject only to the limitations of the Federal Constitution, the State may establish its own procedure."

See also *Salsburg v. State* (Md.) 94 A. 2d 280.

It is to be noted that a statute, such as the one here involved, which concerns a rule of evidence, is completely

different from a statute granting immunity to prosecution to a certain class of citizens. Nor is it denied that Congress has the right to determine rules of evidence for the Federal courts under its jurisdiction. But it is not for one sovereignty to impinge upon another, and as was said by this Court in the case of *Feldman v. United States Oil & Ref. Co.*, 322 U. S. 487, 88 L. Ed. 1408:

> "* * * Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution * * *. The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the Government."

It is respectfully contended that the reverse of this proposition is also true, and if the power to tax be the power to destroy, the unlimited power to make rules of evidence could have no less an effect upon every court in every State, and Congress could supersede the right of the courts of the several States to prosecute crimes within their respective jurisdictions by dropping an iron curtain around all testimony given before Congressional Investigating Committees, or any other arm or branch of the Federal government, which would be certainly not only an end not to be desired, but one which would be inconceivable under our Constitution.

II.

Congress did not intend, by Section 3486 of Title 18 U. S. C. A,. to limit the introduction of evidence before Courts of the State of Maryland.

It has been stated above that, while this Honorable Court has never determined the question of the power of Congress to exclude evidence in State court proceedings, it has, on numerous occasions, construed the intent of Congress in connection with analogous statutes. *Schwartz v. Texas*, 97 L. Ed. 157 (Adv. Sh.); *Bratburd v. State* (Md.) 88 A. 2d 446; *McGuire v. State* (Md.) 92 A. 2d 582. In the case of *Schwartz v. Texas, supra,* this Court considered Section 605 of Title 47 U. S. C. A., part of the Federal Communications Act of 1943, which provides in part, as follows:

> "* * * *no person* not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication *to any person* * * *."

In determining that case, this Court held that this did not manifest an intent of Congress to impose a rule of evidence upon courts of the several States, and said:

> "We are dealing here only with the application of a federal statute to state proceedings. Without deciding, but assuming for the purposes of this case, that the telephone communications were intercepted without being authorized by the sender within the meaning of the Act, the question we have is whether these communications are barred by the federal statute, sec. 605, from use as evidence in a criminal proceeding in a state court.
>
> "* * * *If Congress is authorized to act in a field, it should manifest its intention clearly.* It will not be presumed that a federal statute was intended to super-

sede the exercise of the power of the state unless there is a clear manifestation or intention to do so. The exercise of federal supremacy is not lightly to be presumed.

"The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. Atchison, T. & S. F. R. Co. v. Railroad Commission, 293 U. S. 380, 392, 393, 75 L. Ed. 1128, 1136, 1137, 51 S. Ct. 553. See Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715.

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. Reid v. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108, 114, 23 S. Ct. 92." (Emphasis supplied.)

It is submitted that there is a close analogy between Section 3486, *supra,* and the Federal Communications Act of 1943. Both contain provisions which would appear to be all inclusive. Section 3486 condemns the use of testimony (which is given before a Committee of Congress) *"in any court"*. Section 605, *supra,* provides that "no person" shall divulge intercepted communications "to any person". It is submitted that under the holding in *Schwartz v. Texas, supra,* Congress has not clearly manifested its intention that the immunity granted by Section 3486 is to be applied in State courts. It is to be presumed that when Congress employed the term "in any Court", the reference was to those courts over which Congress has traditionally had power. It is to be noted that this statute does not at-

tempt to set up a complete immunity to prosecution in connection with any subject testified to, as is the case with some other statutes, but simply applies a rule of evidence and certainly Congress cannot have intended to apply rules of evidence to any courts other than those within its own jurisdiction and purview.

It is not doubted that Congress has the power to investigate and secure information which it needs in the public interest, and it undoubtedly has the right to apply complete immunity to a witness called before it in the pursuit of such purpose, and as was determined by this Court in the case of *United States v. Bryan*, 339 U. S. 323, 94 L. Ed. 884, it would be silly to use the terminology of an Act of Congress to defeat the purpose that Congress intended by the Act.

Petitioner's argument with respect to the history of Section 3486, and in particular statements taken from the Debate in 1857 on pages 10 and 11 of his Brief, indicate clearly that at least one of the Congressmen had in mind that this statute would grant complete immunity to prosecution which has, of course, since been determined by this Court not to be the case. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110; *United States v. Bryan*, 339 U. S. 323, 94 L. Ed. 884, where this Court said at pages 893 and 894:

> "Respondent also contended at the trial that the court erred in permitting the Government to read to the jury the testimony she had given before the House Committee when called upon to produce the records. She relies upon Rev. Stat. §859, now codified in §3486 of title 18 U. S. C. A., F. C. A. title 18, §3486, which provides that 'No testimony given by a witness before * * * any committee of either House * * * shall be used as evidence in any criminal proceeding against him in

any court, except in a prosecution for perjury committed in giving such testimony * * *.' Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage. We agree.

"We need not set out the history of the statute in detail. It should be noted, however, that its function was to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony. That purpose was effectively nullified in 1892 by this Court's decision in Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 S. Ct. 195, holding that Rev. Stat. §860, a statute identical in all material respects with Rev. Stat. §859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial protection of a statute such as §§859 and 860 — that his testimony may not be used against him in subsequent criminal proceedings — rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity."

The quotation of the colloquy between Representative Washburn and Representative Taylor, cited in Petitioner's Brief, would indicate that it was the intent of Congress that the law would not be binding upon State courts, nor would it abolish local rules of evidence, and would only apply in a case where a witness was compelled to testify against his will, in which case it would violate a portion of the Constitution of each of the several States against compulsory confessions and self-incrimination. It is admitted

that the law of Maryland, as well as the law of the United States, provides that no person may be compelled to be a witness against himself in any criminal prosecution, but that is not the issue here.

III.

Petitioner waived the privilege, if any, accorded him by the statute by testifying voluntarily to the facts which were subsequently admitted in his trial.

It is to be noted that the statute (Title 18, Section 3486 U. S. C. A.), if it does anything, establishes a privilege to which any person being a witness before a Congressional Committee may avail himself, rather than establishing a substantive commandment relating to a rule of evidence. In fact, Respondent, himself, in his Brief, refers to Petitioner's right under the statute, as a privilege, and the statute itself refers to "the said privilege". And, while the statute itself makes no reference to testimony being either voluntary or involuntary, the fact that it uses the word "privilege", would indicate that such privilege may be waived or availed of, as the particular circumstance suits the person to whom it applies.

Petitioner's testimony given before the Senate Committee was given mainly without any claim of self-incrimination. He has argued in the past that he was under a compulsion to testify, which is obviously not correct, because he did refuse to answer certain questions, availing himself of the *privilege* given him under the Fifth Amendment of the Constitution of the United States, as is clear from the Record and was actually told (Record, pages 63 and 64) that he was not under any compulsion to answer. Notwithstanding this, and notwithstanding that he was acting upon

advice of counsel, he proceeded to testify to matters which clearly had some bearing upon his conviction for conspiracy to violate the lottery laws of the State of Maryland, although he may have been under the misapprehension that he was safe because limitations had run prior to the time of his testifying before the Congressional Committee. It cannot be disputed that Petitioner did have the right to refuse to testify upon the grounds of self-incrimination if he chose to avail himself of that privilege, and it is respectfully urged that, having failed to do so, he has no right to object to the use of such testimony against him in a proper case in a State court, and in the absence of a complete immunity granted by the statute, the evidence was properly admitted. *Counselman v. Hitchcock, supra; United States v. Bryan, supra; United States v. Jaffee,* 98 Fed. Supp. 191; *United States v. Ralley,* 96 Fed. Supp. 495; *Henze v. State,* 154 Md. 332, 140 A. 218. On the above cases and many others, it is well settled doctrine that testimony given under oath at a former trial, before an investigating committee, or elsewhere, is admissible in the trial of a case if the testimony was voluntary and the privilege of refusing to testify because of self-incrimination was waived. Certainly if an accused person may waive the constitutional privilege, he may waive a privilege granted him by an Act of Congress, and having waived it, cannot properly object to the use of his voluntary confessions or admissions against him in a subsequent proceeding. This was substantially what was determined in the case of *May v. United States,* 175 Fed. 2d 994, although that particular case differs in its facts from the case at bar.

Petitioner argues that he was under the compulsion and stress of being charged with a misdemeanor should he refuse to testify. This is obviously untrue from the Record.

The case of *Nelson v. United States,* No. 11353, U. S. Court of Appeals for the District of Columbia, July 2, 1953, cited by Petitioner, is completely different from the instant case because in that case, the Court said that:

> "The Committee threatened prosecution for contempt, if he refused to answer; for perjury if he lied; and for gambling activities, if he told the truth."

There was no such compulsion and no such threats made to William Adams, and it is impossible to find any evidence of such an atmosphere in the Record in this case. His testimony was freely, voluntarily and even eagerly given, and in view of the fact that he was accompanied by counsel, it is almost impossible to believe that he was not advised of his constitutional right to refuse to testify if he so desired. In fact, the constitutional right to refuse to testify on grounds of self-incrimination under the Fifth Amendment, mainly as a result of the activities of this Senatorial Investigating Committee, has become via the television, almost a household word. There is nothing in the Record to indicate, as argued by Petitioner, that the United States lured the Petitioner into testifying with a false hope, nor that the sovereign State of Maryland has been guilty of convicting one of its innocent citizens through trickery and deceit. William Adams, the defendant in the case at bar, is upon his own voluntary admission guilty of the crime of conspiracy to violate the lottery laws of the State of Maryland.

CONCLUSION

Upon the foregoing authorities and argument, it is respectfully submitted that the court below has not erred in affirming the verdict of the Criminal Court of Baltimore City; that the testimony given by the Petitioner before

the Senate Investigating Committee was voluntary and he thereby waives his immunity or privilege, if any; that Congress never intended that Section 3486 of Title 18 U. S. C. A. should apply to rules of evidence in courts of the State of Maryland, and that even had Congress so intended, it has no power to do so.

Respondent, therefore, respectfully submits that no rights of the Petitioner have been violated and the decision of the court below should be affirmed.

Respectfully submitted,

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